Supreme Court of the United States

OCTOBER TERM, 1947

No. 38

JOSEPH F. MAGGIO,

Petitioner,

—against—

RAYMOND ZEITZ, as Trustee in Bankruptcy of LUMA CAMERA SERVICE, INC.

APPELLANT'S BRIEF.

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This brief is submitted as a supplement to the petition for certiorari granted March 10th, 1947 (67 S. Ct. 970).

It is intended to supplement Point C of the argument as set forth in the petition for certiorari.

ARGUMENT.

POINT C.

Supplementing the matter set forth in Point C of the argument in the petition for certiorari, we respectfully call the Court's attention to the following:

In *Oriel* v. *Russell*, 278 U. S. 358, the last decision by this Court on this subject, the Court said at pages 362-363:

> "We think a proceeding for a turnover order in bankruptcy, is one the right to which should be supported by clear and convincing evidence. * * * A mere preponderance of evidence in such a case is not enough. The proceeding is one in which coercive methods by imprisonment are probable and are foreshadowed."

The Court adopted the views in *Toplitz* v. *Walser*, (C. C. A. 3), 27 F. (2d) 196, *Epstein* v. *Steinfeld*, (C. C. A. 3), 210 F. 236, and expressed itself as being in accord with the language in the case of *In re Epstein*, (D. C. Pa.), 206 F. 568. Likewise it indicated that where there is any reasonable doubt of the ability of the bankrupt to comply with the turnover order, the Courts have hesitated to issue orders of commitment.

In the Third Circuit, the turnover order is considered an adjudication of possession of merchandise as of the date of the filing of the petition in bankruptcy, whereas in the Second Circuit, the turnover order is deemed an adjudication of possession of merchandise in the respondent as of the date of such order.

In *Epstein* v. *Steinfeld*, the Court also quoted Judge McPherson's decision in *In re Epstein*, 206 F. 568, quoted at length by the Court in *Oriel* v. *Russell*, as follows:

> "* * * The point of time to which the inquiry is directed is the date of bankruptcy, and the precise question is whether the bankrupt was then in possession or control of money or of goods * * *. Being fundamental, this question needs to be examined first of all, but it neither involves the bankrupt's present ability to turn over, nor raises the question whether he should be punished for contempt * * *. The two questions last referred to, therefore, do not need consideration at the first stage of the investigation * * *."

After thus quoting Judge McPherson, the Court then continued:

> "* * * The second stage is to determine whether or not the property required is still in the possession or control of the bankrupt, and then he is physically able to deliver it to his trustee. The correct practice at this stage of the proceedings has been authoritatively stated by Judge Gray in American Trust Co. v. Wallis, 126 F. 464, 61 C. C. A. 342, in the following language:

> "'* * * If it shall appear that he is not physically able, to deliver the property required by the order, then confessedly, proceedings for contempt, by fine of imprisonment, would result in nothing, certainly not in a compliance with the order. The contempt in this case can only be purged by a reiteration of the physical impossibility to comply with the order whose disobedience is being thus punished. An order made under such circumstances would be as absurd as it is inconsistent with the principles of individual liberty.'"

In the recent decision of this Court in *United States* v. *United Mine Workers of America*, 67 S. Ct. 677, the Court by Mr. Chief Justice Vinson, at page 701, said:

> "But where the purpose is to make the defendant comply, the court's discretion is otherwise exercised. It must then consider the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction, in bringing about the result desired.
>
> "It is a corollary of the above principles that a court which has returned a conviction for contempt must, in fixing the amount of a fine to be imposed as a punishment or as a means of securing future compliance, consider the amount of defendant's financial resources and the consequent seriousness of the burden to that particular defendant."

In a dissenting opinion, Mr. Justice Black (concurred in part by Mr. Justice Douglas), said at page 715:

> "At a very early date this Court declared and recently it has reiterated, that in contempt proceedings courts should never exercise more than 'the least possible power adequate to the end proposed.' Anderson v. Dunn, 6 Wheat. 204, 231, 5 L. Ed. 242; In re Michael, 326 U. S. 224, 227, 66 S. Ct. 78.

"* * * Whatever constitutional safeguards are required in a summary contempt proceeding, whether it be for criminal punishment, or for the imposition of coercive sanction, we must be ever mindful of the danger of permitting punishment by contempt to be imposed for conduct which is identical with an offense defined and made punishable by Statute. In re Michael, 326 U. S. 224, 66 S. Ct. 78, 79."

Mr. Justice Rutledge, in his dissenting opinion, said at pages 737-738:

"* * * The law has fixed standards for each remedy, and they are neither identical nor congealable. They are, for damages in civil contempt, the amount of injury proven and no more, Gompers v. Buck's Stove & R. Co., supra, 221 U. S. at page 444, 31 S. Ct. at page 499, 55 L. Ed. 797, 34 L. R. A., N. S., 874; for coercion, what may be required to bring obedience and not more, whether by way of imprisonment or fine; for punishment, what is not cruel and unusual or, in the case of a fine, excessive within the Eighth Amendment's prohibition. * * *

"The Government concedes that the Eighth Amendment's limitation applies to penalties in criminal contempt; and that in civil contempt the damages awarded cannot exceed the proven amount of injury. It also concedes, as I understand, that purely coercive relief can be no greater than is necessary to secure obedience. * * *"

In the light of the decision of this Court and the opinions of the dissenting Justices, it is time to eliminate the unfortunate results of the unreasonable fiction invoked by the lower Courts in the instant proceeding. It is time that an end be put to a fiction which is working an injustice, obscuring the facts and is entirely unrelated to reality.

In *Penfield Co. of California* v. *Securities & Exchange Commission*, 67 S. Ct. 918, Mr. Justice Rutledge, in a concurring opinion, at page 924, said:

> "The character of the proceedings as a whole, whether as Civil or Criminal must be co-related with the character of the penalty imposed, * * *."

In a dissenting opinion (concurred in in part by Mr. Justice Jackson) Mr. Justice Frankfurter, at page 930, said:

> "If a District Court believes howsoever relative a demand for documents may have been at the time it was made, circumstances had rendered the subpoena obsolete, it is entitled to consider the merits of the subpoena as of the time that its enforcement is sought and not as of the time it was issued. We particularly ought not to reverse the action of the District Judge on the abstract assumption that papers ordered to be produced as relative to an inquiry at the time the subpoena issued, continued relevant several months later."

This principle enunciated by Mr. Justice Frankfurter, is likewise urged here, that the merits of the motion to punish for contempt and ability to comply, should be considered as of the time the enforcement is sought, to wit, the time of the making of the motion for punishment for contempt and not as of the time the turnover order was issued.

Just as Mr. Justice Frankfurter stated, that the Court ought not to rely on an abstract assumption, so too here should the Court not rely upon any "abstract presumption."

In the recent issue of the "University of Pennsylvania Law Review", Volume 95, pages 789-791, this very case was written up in a case note, and in discussing the application of the presumption of continued possession states (at p. 791):

> "Use of the presumption, however should be tempered with judicial discretion.[16] Essentially it is a presumption of fact,[17] no stronger than the circumstances warrant,[18] and hence it becomes an 'unreasonable fiction' only when applied in contradiction of the facts. Since the circumstances in the instant case apparently warranted the court's expressed conviction that appellant was no longer able to comply with the turnover order,[19] the difficulty of the court was not that the presumption had to be applied because of the precedent, but that it must be applied conclusively in defiance of the facts. It is doubtful that the Supreme Court should approve this interpretation of its rule in the Oriel Case."

In the light of the foregoing, it is respectfully submitted with a proper interpretation of the facts in this case and the decision of *Oriel* v. *Russell*, 278 U. S. 358, that a presumption of continued possession, is not applicable herein.

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[16] Brune v. Fraidin, 149 F. 2d 325 (C. C. A. 4th 1945) (power to commit for contempt should be exercised carefully); In re Nevin, 278 Fed. 601 (C. C. A. 6th 1922) (bankrupt committed should not be confined indefinitely).

[17] 2 Wigmore, Evidence § 382 (3d ed. 1940); 9 id. § 2530; McGovern, supra note 5, at 333.

[18] In re Pinsky-Lapin & Co., 98 F. 2d 776 (C. C A. 2d 1938); Brune v. Fraidin, 149 F. 2d 325 (C. C. A. 4th 1945); Marin v. Ellis, 15 F. 2d 321 (C. C. A. 8th 1926); 2 Collier Bankruptcy 524-525 (turnover proceedings); 1 id. at 246-247 (contempt proceedings).

CONCLUSION.

It is respectfully submitted that the proper interpretation of the facts, the sections of the Bankruptcy Act and the cases in question, require an order granting the petitioner's application and adjudging that presumption of continued possession is not applicable herein and that the order adjudging the petitioner in contempt be vacated and set aside.

It is respectfully submitted that the order of the Circuit Court should be reversed with a direction to reverse the order of the District Court and that an order be entered denying the application of Raymond Zeitz, as trustee, to punish the petitioner as and for a contempt.

Respectfully submitted,

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